SHAHRIZAL ABDUL GHANI

v.

PP

COURT OF APPEAL, PUTRAJAYA
ABU SAMAH NORDIN JCA
AZAHAR MOHAMED JCA
MOHD ZAWAWI SALLEH JCA
[CRIMINAL APPEAL NO: P-05-38-2011]
7 OCTOBER 2013

CRIMINAL LAW: *Dangerous Drugs - Trafficking - Chemist failed to testify - Chemist report prepared by science officer - Admissibility of chemist report - Whether s. 399(2)(c) of Criminal Procedure Code envisaged that chemist report must be prepared by government chemist - Whether class of persons to whom s. 399 of CPC applies is exhaustive - Whether report admissible without attendance of maker*

CRIMINAL LAW: *Dangerous drugs - Trafficking - Whether appellant identified as actual trafficker - Whether had knowledge of dangerous drugs contained in bag - Whether presence of third person cast reasonable doubt in prosecution's case*

EVIDENCE: *Agent provocateur - Informer - Whether informer participated in negotiation - Whether informers became agent provocateurs - Whether lost protection under s. 40 of Dangerous Drugs Act 1952*

EVIDENCE: *Exhibit - Identity of exhibits - Dangerous drugs - Whether every link in chain of custody explained satisfactorily - Whether drug exhibit positively identified*

EVIDENCE: *Expert evidence - Chemist's report - Offence of trafficking in dangerous drugs - Chemist report prepared by science officer - Admissibility of chemist report - Whether s. 399(2)(c) of Criminal Procedure Code envisaged that chemist report must be prepared by government chemist - Whether class of persons to whom s. 399 of CPC applies is exhaustive - Whether report admissible without attendance of maker*

EVIDENCE: *Judicial notice - Legal Notification - Offence of trafficking in dangerous drugs - Chemist report prepared by science officer - Notification of Declaration under s. 399(2) of Criminal Procedure Code - Science officers recognised as class of persons to whom s. 399 of CPC applies - Whether fact need to be proved - Whether chemist repost admissible - Evidence Act 1950, ss. 56 & 57(1)(a)*

Sarjan Mejar Busra ('PW4') was introduced to the appellant by his informer and PW4 proceeded with negotiations with the appellant and subsequently reached an agreement to purchase the drugs. The appellant was asked to deliver the drugs to Inspector Saifulazre ('PW5'), which the appellant agreed. The appellant then retrieved a sling bag from the car, clutched the bag and placed it on the floor mat of the passenger's side of PW5's car. During this action, one Ahmad Tayyib was seen seated in the car driven by the appellant. The appellant and Ahmad Tayyib were arrested by ASP Mohd Salleh ('PW2') and the items seized were sent to Puan Rosni ('deceased') for chemical analysis who, *via* a chemist report, confirmed same to be cannabis, a dangerous drug. The appellant was thus charged under s. 39B(1)(a) of the Dangerous Drugs Act 1952 ('DDA') for trafficking and was convicted and sentenced to death by the High Court. In this appeal, the appellant raised questions of considerable importance concerning the admissibility of the chemist report which the prosecution tendered under s. 399 of the Criminal Procedure Code ('CPC') in order to prove that the subject matter of the charge is a dangerous drug as defined in s. 2 of the DDA. It was submitted for the appellant that the officer who prepared the chemist report, since deceased, was a "Pegawai Sains" and not a government chemist under s. 399(2)(c) of the CPC and therefore, the report was inadmissible. The appellant also submitted that there were serious doubts as to the identity of the drug exhibit on the grounds that there were inconsistent descriptions of the markings of the exhibits and discrepancies in the weight mentioned in the chemist report compared to the original charge. The appellant further contended that the learned trial judge had mishandled the facts with regards to Ahmad Tayyib and that the informers had become agent provocateurs, thereby depriving them of the protection under s. 40 of the DDA.

Held (dismissing appeal; affirming conviction and sentence by High Court)
Per Mohd Zawawi Salleh JCA delivering the judgment of the court:

(1) The class of persons to whom s. 399 of the CPC may apply is not exhaustive as sub-s. (2)(f) confers powers upon the Minister to gazette other persons or other class of persons. The Gazette Notification in the Notification of Declaration under s. 399(2) of the CPC provides effective recognition that science officers employed by the Chemistry Department is a class of persons to whom the provisions of s. 399 of the CPC shall apply and whose report may be given in evidence, without the makers being required to attend as witnesses, provided that the pre-condition of service of a copy of the report as laid down in the section had been strictly complied with. (paras 26 & 28)

(2) It is trite that under s. 57(1)(a) of the Evidence Act 1950 ('the Act') the court must take judicial notice of all laws or regulations having the force of law now or heretofore in force or hereafter to be in force in Malaysia or any part thereof. Judicial notice must therefore be taken of Legal Notification and Gazette Notification. Section 56 of the Act provides that no fact, of which a court can take judicial notice, need be proved. It is one of the exceptions to the general rule that all facts in issue and relevant facts must be proved by evidence. On the facts, the chemist report was served upon the appellant and no notice was given by the appellant or his counsel to the Public Prosecutor under s. 399(1)(b) of the CPC prior to the commencement of trial. Therefore, the learned trial judge had not erred in admitting the report. (paras 29, 30 & 31)

(3) Based on the evidence, particularly of SP2, SP6 and the chemist report, the submission that there were serious doubts as to the identity of the drug exhibits was devoid of any merit. The ground that the markings of the exhibits were inconsistent was misconceived. During the course of trial, both SP2 and SP6 had explained the condition of the exhibits and the respective markings and had also made positive identification of the exhibits based upon the photographs. (paras 33, 34 & 40)

(4) The exhibit recovered or seized by the police was the same exhibit sent to and examined by the deceased and subsequently produced in the court as evidence. The prosecution had adduced sufficient evidence in respect of every link in the chain of custody, from the moment the exhibit was recovered by the police up to the time it was produced in the court. The witnesses had described how and from whom it was received, where it was and what happened to it while in the witnesses' custody, the condition in which it was received and the condition in which it was handed over to the next link in the chain of custody. (para 44)

(5) The prosecution witnesses had positively identified the appellant to be the man who was present in the restaurant and conducted the negotiation for sale of the drugs. They had denied the suggestions put forth by the defence counsel that Ahmad Tayyib was the actual trafficker. The appellant was seen clutching the bag and personally delivered it to PW5 and informed PW5 that there were five slabs of drugs in the bag. In the circumstances, he certainly had the knowledge that the bag contained drugs and was not a conduit pipe. Hence, the presence of Ahmad Tayyib could not cast a reasonable doubt in the prosecution's case. (paras 48, 49 & 50)

(6) The first informer's role was limited to mere introduction of PW4 to the appellant. Though he was present, there was no iota of evidence that the first informer had participated in the negotiation. His presence was merely to lend credence to PW4's intention to purchase the drugs in the minds of the appellant. The second informer's role was even smaller as he had done nothing apart from being present at the restaurant with PW5. Hence, they had not metamorphosed into agent provocateurs. (para 53)

Bahasa Malaysia *Translation Of Headnotes*

Sarjan Mejar Busra ('PW4') diperkenalkan kepada perayu oleh pemberi maklumatnya dan PW4 terus berunding dengan perayu dan kemudian mencapai persetujuan untuk membeli dadah. Perayu diminta menghantar dadah tersebut kepada Inspektor Saifulazre ('PW5'), yang mana perayu bersetuju. Perayu kemudiannya mengeluarkan sebuah beg galas dari kereta, mengepit bag tersebut

dan meletakkannya di atas alas kaki di bahagian penumpang kereta PW5. Semasa tindakan ini, seorang yang bernama Ahmad Tayyib dilihat duduk dalam kereta yang dipandu oleh perayu. Perayu dan Ahmad Tayyib ditangkap oleh ASP Mohd Salleh ('PW2') dan barang-barang yang dirampas telah dihantar kepada Puan Rosni ('si mati') untuk analisa kimia dan melalui laporan kimia, mengesahkannya sebagai kanabis, dadah berbahaya. Perayu, oleh itu, dituduh di bawah s. 39B(1)(a) Akta Dadah Berbahaya 1952 ('ADB') bagi pengedaran dan disabitkan dan dijatuhkan hukuman mati oleh Mahkamah Tinggi. Dalam rayuan ini perayu membangkitkan persoalan penting berkaitan dengan kebolehterimaan laporan kimia yang dikemukakan oleh pendakwaan di bawah s. 399 Kanun Tatacara Jenayah ('KTJ') untuk membuktikan bahawa subjek perkara pertuduhan adalah dadah berbahaya seperti yang ditakrifkan dalam s. 2 ADB. Adalah dihujahkan bagi pihak perayu bahawa pegawai yang membuat laporan kimia, si mati, adalah pegawai sains dan bukan ahli kimia kerajaan di bawah s. 399(2)(c) KTJ dan, dengan itu, laporan tersebut adalah tidak boleh diterima. Perayu juga menghujah bahawa terdapat keraguan yang serius berkaitan dengan identiti ekshibit dadah atas alasan bahawa terdapat ketidakkonsistenan deskripsi dalam penandaan ekshibit-ekshibit dan percanggahan berkenaan berat yang dinyatakan dalam laporan kimia berbanding dengan pertuduhan asal. Perayu selanjutnya menghujahkan bahawa yang arif hakim telah tersalah mempertimbangkan fakta berkaitan dengan Ahmad Tayyib dan bahawa pemberi-pemberi maklumat telah menjadi agen provokasi dan oleh itu, perlindungan di bawah s. 40 ADB tidak terpakai kepada mereka.

Diputuskan (menolak rayuan; mengesahkan sabitan dan hukuman oleh Mahkamah Tinggi)
Oleh Mohd Zawawi Salleh HMR menyampaikan penghakiman mahkamah:

(1) Kelas bagi seseorang yang terhadapnya s. 399 KTJ terpakai tidak lengkap kerana sub-s. (2)(f) memberikan kuasa kepada Menteri untuk mewartakan orang lain atau kelas-kelas lain. Pemberitahuan warta dalam Pemberitahuan Deklarasi di bawah s. 399(2) KTJ memperuntukkan pengiktirafan yang efektif bahawa pegawai sains yang bekerja dengan Jabatan Kimia adalah orang dari kelas yang mana peruntukan s. 399 KTJ

terpakai dan yang mana laporannya boleh diberikan sebagai keterangan, tanpa memerlukan kehadiran pembuatnya sebagai saksi, jika pra-syarat bagi penyerahan salinan laporan seperti yang dinyatakan dalam seksyen tersebut dipatuhi secara ketat.

(2) Adalah matan bahawa di bawah s. 57(1)(a) Akta Keterangan 1950 ('Akta') mahkamah mesti mengambil notis kehakiman bahawa kesemua undang-undang dan peraturan yang mempunyai kuasa undang-undang semasa atau berkuatkuasa sehingga kini atau akan berkuatkuasa selepas ini di Malaysia atau sebahagian daripadanya. Seksyen 56 Akta memperuntukkan bahawa tidak ada fakta, yang mana mahkamah akan mengambil notis kehakiman, yang perlu dibuktikan. Ia adalah salah satu pengecualian kepada peraturan umum bahawa kesemua fakta dalam isu dan fakta-fakta relevan mesti dibuktikan dengan keterangan. Di atas fakta, laporan kimia diserahkan kepada perayu dan tidak ada notis yang diberikan oleh perayu atau peguamnya kepada Pendakwa Raya di bawah s. 399(1)(b) KTJ sebelum permulaan perbicaraan. Oleh itu, yang arif hakim bicara tidak terkhilaf dalam menerima laporan tersebut.

(3) Berdasarkan keterangan, khususnya keterangan SP2, SP6 dan laporan kimia, penghujahan bahawa terdapat keraguan yang serius berkaitan identiti ekshibit dadah adalah tidak bermerit. Alasan bahawa penandaan ekshibit tidak konsisten adalah salah tanggap. Semasa perbicaraan, kedua-dua SP2 dan SP6 telah menjelaskan keadaan ekshibit-ekshibit tersebut dan penandaan masing-masing dan juga telah mengenalpasti secara positif ekshibit-ekshibit tersebut berdasarkan foto.

(4) Ekshibit yang dirampas atau disita oleh pihak polis adalah ekshibit yang sama yang dihantar dan diperiksa oleh si mati dan kemudiannya dikemukakan di mahkamah sebagai keterangan. Pihak pendakwaan telah mengemukakan keterangan yang secukupnya berkaitan dengan setiap peringkat rantaian milikan, dari masa ekshibit tersebut dirampas oleh polis sehingga ia dikemukakan di mahkamah. Saksi-saksi telah menjelaskan bagaimana dan daripada siapa ia diterima, di mana ia disimpan dan apa yang berlaku kepadanya semasa dalam milikan saksi-saksi, keadaannya semasa ia diterima dan keadaannya semasa ia diserahkan kepada rantaian milikan yang seterusnya.

(5) Saksi-saksi pendakwaan telah mengenalpasti secara positif perayu sebagai orang yang hadir di restoran dan berunding untuk penjualan dadah. Mereka menafikan cadangan yang dikemukakan oleh peguambela bahawa Ahmad Tayyib adalah pengedar yang sebenarnya. Perayu dilihat mengepit bag tersebut dan menyerahkannya sendiri kepada PW5 dan memberitahu kepada PW5 bahawa terdapat lima bongkah dadah dalam beg tersebut. Dalam keadaan tersebut, dia sememangnya mempunyai pengetahuan bahawa beg tersebut mengandungi dadah dan bukan hanya menjadi penghubung.

(6) Peranan pemberi maklumat pertama terhad kepada memperkenalkan PW4 kepada perayu. Walaupun dia hadir, tidak ada sedikit pun keterangan bahawa pemberi maklumat pertama telah mengambil bahagian dalam perundingan tersebut. Kehadirannya hanya untuk membuktikan kebenaran niat PW4 untuk membeli dadah pada pandangan perayu. Peranan pemberi maklumat kedua adalah lebih kecil lagi kerana dia tidak berbuat apa-apa selain daripada hadir di restoran dengan PW5. Maka, mereka tidak bertukar menjadi agen provokasi.

Case(s) referred to:
Ghazalee Kassim & Ors v. PP [2009] 4 CLJ 737 FC ***(refd)***
Johnson Tan Han Seng v. PP & Other Appeals [1977] 1 LNS 38 FC ***(refd)***
Munusamy Vengadasalam v. PP [1987] 1 CLJ 250; [1987] CLJ (Rep) 221 SC ***(refd)***
PP v. Mansor Md Rashid & Anor [1997] 1 CLJ 233 FC ***(refd)***
PP v. Mohamed Ali [1962] 1 LNS 129 HC ***(refd)***
PP v. Rajamah [1980] 1 LNS 64 FC ***(refd)***
Samivellu v. PP [1971] 1 LNS 129 HC ***(refd)***
Wan Yurillhami Wan Yaacob & Anor v. PP [2010] 1 CLJ 17 FC ***(refd)***
Zaifull Muhammad v. PP & Another Appeal [2013] 2 CLJ 383 FC ***(dist)***
Zulkifli Md Rodzi v. PP [2013] 4 CLJ 250 CA ***(dist)***

Legislation referred to:
Criminal Procedure Code, s. 399(1)(b), (2)(c)
Dangerous Drugs Act 1952, ss. 2, 39B(1)(a), (2), 40
Evidence Act 1950, ss. 56, 57(1)(a)

For the appellant - Ranjit Singh Dhillon; M/s J Kaur, Ranjit & Assocs
For the respondent - Ahmad Bache; DPP

[Appeal from High Court, Pulau Pinang; Criminal Trial No: 45-20-2009]

Reported by S Barathi

A

JUDGMENT

Mohd Zawawi Salleh JCA:

Introduction

B **[1]** This appeal is directed against the judgment of the High Court of Penang dated 10 February 2011. *Vide* the impugned judgment, the High Court convicted the appellant for an offence of drug trafficking under s. 39B(1)(a) of the Dangerous Drugs Act 1952 ("DDA") and sentenced him to death.

C

The Charge

[2] The charge reads as follows:

> Bahawa kamu pada 14 Mac 2008, jam lebih kurang 10.00 malam,
D di Restoran Nasi Kandar Pelita, Juru Autocity, Bukit Tengah, di dalam Daerah Seberang Tengah di dalam Negeri Pulau Pinang, telah memperedarkan dadah berbahaya jenis cannabis seberat 4420 gram dan dengan itu kamu telah melakukan suatu kesalahan di bawah seksyen 39B(1)(a) Akta Dadah Berbahaya 1952 yang boleh dihukum di bawah seksyen 39B(2) Akta yang sama.

E

[3] This appeal raises questions of considerable importance concerning the admissibility of chemist report under s. 399 of the Criminal Procedure Code ("CPC") in order to prove that the subject matter of the charge is a "dangerous drug" as defined in
F s. 2 of the DDA.

[4] It is necessary, before we embark upon the task of examining the merits or otherwise of the appeal, to state the facts of the case.

G

Facts Of The Case

The Prosecution's Version

[5] On 14 March 2008, at about 8.15pm, at Restoran Nasi
H Kandar Pelita, Juru, Penang, Sarjan Mejar Busra bin Abdul Kadir (PW4) was introduced to the appellant by his informer. PW4 then introduced himself as 'Along'. The appellant was nicknamed 'Abang'.

I

[6] PW4 negotiated with the appellant for the purchase of proscribed drugs. The appellant offered 5kg of cannabis at the price of RM2,650 per kg. PW4 finally agreed to the price after some bargaining. A

[7] Before the appellant left the restaurant to get the drugs, PW4 asked the appellant to then deliver the drugs to Inspector Saifulazre bin Ghazali (PW5) and to collect the money from PW4, which the appellant agreed. B

[8] PW5 met up with the appellant outside the restaurant. He led the appellant to a Proton Waja bearing registration number WML 4578 which was parked nearby. He informed the appellant that he would take delivery in the car. The appellant agreed with that plan. C

[9] PW5 waited in the car. At about 10pm, PW4 saw a Proton Wira Aeroback approaching and stopped in front of his car. The appellant was the driver while another man (later identified as Ahmad Tayyib) was sitting at the front passenger seat. D

[10] Both the appellant and Ahmad Tayyib exited the car. Ahmad Tayyib went to sit at the driver's seat while the appellant opened the back passenger door of that car and retrieved a sling bag (P17). The appellant clutched the bag and walked towards PW5's car. He opened the front passenger seat of PW5's car and placed the bag on the floor mat of the passenger's side of the vehicle. PW5 asked the appellant: 'how many?' in which the appellant answered: 'five'. E F

[11] PW5 unzipped the bag and found five slabs of compressed cannabis. PW5 then informed the appellant that the money is to be collected from 'Along' at the restaurant. The appellant then returned to the restaurant. G

[12] After having received confirmation from PW5 that the drugs were delivered, PW4 gave a pre-arranged signal, that is by scratching his head. Thereupon, ASP Mohd Salleh bin Abbas (PW2), rushed towards the appellant and arrested him. Ahmad Tayyib was also arrested by the police ambush party. H

[13] PW2 then led the appellant to PW5's car. PW5 showed PW2 the bag which was on the floor mat, passed it to PW2 and left the scene. PW2 opened the bag and found five slabs of I

A compressed cannabis, wrapped in transparent plastics. The appellant, Ahmad Tayyib, together with the seized items, were all brought to IPD Seberang Perai Tengah.

[14] The seized items were sent to Puan Rosni binti Hamid
B (deceased) for chemical analysis and *via* chemist report (P22), they were confirmed to be cannabis, a dangerous drug, having a net weight of 4,420g.

The Defence's Version

C **[15]** The appellant gave evidence on oath. The appellant protested his innocence. The appellant admitted that he was with Ahmad Tayyib on the day in question. He accompanied Ahmad Tayyib to the restaurant as the latter wanted to meet his friends.

D **[16]** The appellant said that while Ahmad Tayyib was chit-chatting with his friends, he was watching the television programme. He had no idea about the matters that were discussed between Ahmad Tayyib and his friends.

E **[17]** The appellant went to the washroom and upon returning, he saw Ahmad Tayyib leaving the restaurant followed by one of his friends. They returned after 15-20 minutes. Then, a number of persons approached their table and arrested both him and Ahmad Tayyib.

F **[18]** The appellant denied negotiating for the sale of any drug with PW4. He admitted having seen the sling bag while he was in the car but denied having any knowledge as to what was contained in the bag.

G **[19]** At the end of the trial, the learned trial judge entertained no reasonable doubt that the evidence laid before her proved the appellant's guilt. After finding him guilty, as already pointed out, she sentenced the appellant to death as mandated under s. 39B(2) of the DDA.

H

The Appeal

[20] The learned trial judge's decision is impugned on the following grounds:

I (a) That the chemist report was wrongly admitted;

(b) There are serious doubts as to the identity of the drug exhibit;

(c) The learned trial judge had mishandled the facts with regards to Ahmad Tayyib; and

(d) The informers had become agent of provocateurs.

[21] Speaking through his learned counsel, Mr Ranjit Singh Dhillon, the appellant has strongly urged us to quash his conviction. Mr Ahmad bin Bache, learned Deputy Public Prosecutor, opposed it.

[22] We will proceed to deal with each of the grounds advanced by learned counsel in turn.

Ground (a): Admissibility Of The Chemist Report

[23] The chemist report was prepared by one Rosni binti Hamid, prior to her untimely demise. After having satisfied that the requirements under s. 399 of CPC have been complied with, and no objection was forthcoming from the defence, the learned trial judge admitted the said report and marked it as exh. P22.

[24] It was forcefully contended by learned counsel for the appellant, that from the evidence of PW7 (Director of the Penang Chemistry Department), the deceased is a "Pegawai Sains" and not a government chemist under s. 399(2)(c) of the CPC. Therefore, s. 399 of the CPC does not apply and the report remains inadmissible although no objection was taken. The recent decision of this court, *Zulkifli Md Rodzi v. PP* [2013] 4 CLJ 250; [2013] 3 AMR 263, was cited in support of this contention. As regards "Pegawai Sains", the Court of Appeal had this to say at p. 259 (CLJ); p. 28 (MLJ):

> [9] From the evidence of SP5 it is clear that he is not a government chemist though his function relates to the work of the chemist. *In essence if the report is not from the government chemist it is not admissible and has no relevance for purpose of s. 399 CPC even though it was couched as a report under s. 399 CPC.* Support for the proposition is found in a number of cases in India, even though there is no equipollent section such as s. 399 of the CPC in India. Section 293 of Indian Criminal Code which deals with similar issues, and the commentary to the said section by the learned author of Ratanlal & Dhirajlal, 13th edn, 1987 to *The Code of Criminal Procedure* at p. 304 reads as follows:

A This section makes provision for accepting in evidence reports made by certain Government Scientific Experts. It applies to the report of a "Chemical Examiner or Assistant Chemical Examiner". It does not extend to the report made by an Additional Chemical Examiner [*Atul Muchi*, (1984) 10 Cal 1026], or the Professor of Anatomy at the Government Medical College. [*Ahilya* (1922) 24 Bom LR 803, 47 Bom 74].

[10] The learned deputy public prosecutor's argument that exh. P13 can be admitted under s. 45 EA 1950 cannot be sustained as it is trite that if a special procedure is prescribed under the Act then the general provisions found in the Act or other Acts cannot be followed. This principle is expressed by the maxim *genaralia specialibus non derogant*. [see *PP v. Sandara Margaret Birch* [1997] 1 MLJ 129; *Baldeo and Others v. Emperor* 1940 AIR Alahabad 263; Article by Hamid Sultan bin Abu Backer - *Md. Desa v. PP* - A classic display of judicial vigilance [1997] 1 MLJ LXXXIII]. The courts in India have gone to the extent of saying that if the report does not comply with the said section then for purpose of admissibility it is nothing more than a "little scrap paper ... it is not legal evidence" [see *Peary Lai v. Emperor*, A.I.R. 1938 Lah 496]. In essence the court is not bound to accept and act on such report as conclusive evidence of its contents, [see *Bhaskaran v. State*, 1967 Ker L T 165].

[11] In the instant case the evidence of SP5 and also his report exh. P13 has to be expunged. Once it has been expunged the prosecution case would have collapsed at the prosecution stage as the elements of the charge would not have been established and the accused had to be acquitted and discharged. (emphasis added).

[25] In spite of the high authority which was not favourable to the prosecution, learned deputy prosecutor was able to rise to the occasion. He referred us to s. 399 of the CPC. This section reads as follows:

(1) Any document purporting to be a report under the hand of any of the persons mentioned in subsection (2) upon any person, matter or thing examined or analysed by him or any document purporting to be a report under the hand of the Registrar of Criminals upon any matter or thing relating to finger impressions submitted to him for report may be given in evidence in any inquiry, trial or other proceeding under this Code unless that person or Registrar shall be required to attend as a witness:

(a) by the Court; or

(b) by the accused, in which case the accused shall give notice to the Public Prosecutor not less than three clear days before the commencement of the trial:

Provided always that in any case in which the Public Prosecutor intends to give in evidence any such report he shall deliver a copy of it to the accused not less than ten clear days before the commencement of the trial.

(2) The following are persons to whom the provisions of this section apply:

(a) officers of the Institute for Medical Research;

(b) Government Medical Officers;

(c) chemists in the employment of any Government in Malaysia or of the Government of Singapore;

(d) any person appointed by the Minister by notification in the Gazette, to be a Document Examiner;

(e) Inspector of Weights and Measures appointed as such under any written law relating to weights and measures in force in Malaysia; and

(f) any person or class of persons to whom the Minister by notification in the Gazette declares that the provisions of this section shall apply.

(3) The persons referred to in subsection (2) and the Registrar of Criminals are by this Code bound to state the truth in reports made under their hands. (emphasis added).

[26] The learned deputy public prosecutor submitted that from a bare reading of the above provision, the irresistible and inescapable conclusion is that the class of persons to whom the section may apply is not exhaustive as sub-s. (2)(f) confers powers upon the Minister to gazette other person or other class of persons. Learned deputy public prosecutor produced for our consideration the relevant Gazette, namely, P.U.(B) 324 of 2004.

[27] For ease of reference, Gazette Notification P.U.(B) 324 of 2004 is reproduced and it reads as follows:

CRIMINAL PROCEDURE CODE

NOTIFICATION OF DECLARATION UNDER SUBSECTION 399(2)

In exercise of the powers conferred by paragraph 399(2)(f) of the Criminal Procedure Code [Act 593], the Minister declares that the Science Officers employed in the Chemistry Department, Malaysia and who prepare reports on any person, matter or thing referred to the Department for examination or analysis, is a class of persons to whom the provisions of section 399 of the Criminal Procedure Code shall apply.

(2) The declaration under paragraph (1) shall apply to the Science Officers for the period that they remain employed in the Chemistry Department, Malaysia.

Dated: 3 August 2004

[KSTAS, 260.010/A002B Jil. 3; PN (PU) 224/III]

DATO' MOHD RADZI SHEIKH AHMAD
Minister in the Prime Minister's Department

[28] In our view, this Notification of Declaration which in effect is the effective recognition that science officers employed by the Chemistry Department is a class of persons to whom the provisions of s. 399 of the CPC shall apply and whose report may be given in evidence, without the makers being required to attend as witnesses, provided that the precondition of service of a copy of the report as laid down in the section had been strictly complied with.

[29] It is trite that under s. 57(1)(a) of the Evidence Act 1950 the court must take judicial notice of all laws or regulation having the force of law now or heretofore in force or hereafter to be in force in Malaysia or any part thereof. Judicial notice must therefore be taken of Legal Notification (see *PP v. Mohamed Ali* [1962] 1 LNS 129; [1962] MLJ 257 (HC)) and Gazette Notification (see *PP v. Rajamah* [1980] 1 LNS 64; [1980] 2 MLJ 280 (FC)). In *Samivellu v. PP* [1971] 1 LNS 129; [1972] 1 MLJ 28 (HC), it was held that a court is only bound to take judicial notice of any

regulation when the relevant Gazette Notification is either quoted in the charge or adduced in evidence. This view, however, did not find favour with the Federal Court in *Johnson Tan Han Seng v. PP & Other Appeals* [1977] 1 LNS 38; [1977] 2 MLJ 66 (FC), where Raja Azlan Shah FJ (as His Highness then was) said at p. 78:

> I agree with the learned Lord President that *Samivellu v. Public Prosecutor* [1972] 1 MLJ 28 was wrongly decided. Proclamation PU(A) 148/69 is the law which the court can take judicial notice.

[30] Section 56 of the Evidence Act 1950 provides that no fact of which a court can take judicial notice need be proved. It is one of the exceptions to the general rule that all facts in issue and relevant facts must be proved by evidence.

[31] It is not in dispute that P22 was served upon the appellant on 8 February 2010. No notice was given by the appellant or his counsel to the Public Prosecutor under s. 399(1)(b) of the CPC prior to the commencement of trial on 20 September 2010. Therefore, it is our considered view that the learned trial judge had not erred in admitting the said report.

[32] We have examined the case of *Zulkifli Md Rodzi v. PP (supra)* with great care and have found that the court's attention was apparently not drawn to the Gazette Notification P.U.(B) 224 of 2004. The decision of the court in that case could have been different if the parties had drawn the court's attention to it.

Ground (b): Identity Of The Drug Exhibit

[33] Learned counsel for the appellant submitted that in the present case that there were serious doubts as to the identity of the drug exhibit based on the following grounds:

(i) Inconsistent descriptions of the markings of the exhibits; and

(ii) Discrepancies in the weight mentioned in the exh. P22 (4,420g grams) compared to the original charge (5,000g).

[34] With respect, based on the evidence, the submission is devoid of any merit. The material evidence on these issues are that of SP2, SP6 and exh. P22. SP2 testified that from the time he took possession of the exhibits at the place of incident until he handed them over to the investigating officer (SP6), the drugs

A exhibits were under his personal custody and control. When he arrived at his office, he marked the beg as 'S' and the five slabs of drug exhibits wrapped in transparent plastics as 'S1-S5'. He also weighed the drug exhibits and the gross weight was 5kg. He then handed over the exhibits to SP6.

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[35] SP6, in his testimony, confirmed that he received exhibits bearing those markings from SP2 at about 11.50pm. He later marked the bag as 'R' and the five slabs of drug exhibits as 'R1-R5'. He then kept the exhibits in the steel cabinet under lock and

C key.

[36] On 15 March 2008, at about 3pm, SP6 took the exhibits from the steel cabinet for the purpose of having them photographed at his office. The exhibits were then packed in a box. SP6 placed a wax seal bearing with words 'PDRM 595', his name, the report

D number on the box. The box was kept in the steel cabinet under lock and key.

[37] On 17 March 2008, SP6 sent the box containing the marked exhibits to the deceased, together with a cover letter,

E requesting chemical analysis, POL 31 (P19). While preparing P19, SP6 had listed the description of the bag and the drug exhibits and the markings that he made. He confirmed that the deceased opened the box and inspected the exhibits in his presence before issuing the receipt (P20). He received the exhibits from the

F deceased on 16 December 2008 at about 4.30pm together with the report (P22).

[38] The deceased, *via* P22, gave the description of the exhibits, as follows:

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(i) Satu bungkusan bertanda 'R' termeterai 'POLIS DI-RAJA MALAYSIA 595';

(ii) Satu beg bertanda 'R'; and

H (iii) Lima bungkusan plastik bertanda 'R-1' hingga 'R-5'.

[39] Learned counsel contended that the exhibits received by the deceased bore different markings from the exhibits that were actually sent to the Chemistry Department.

I

[40] With respect, the first ground advanced by learned counsel is misconceived. During the course of the trial, both SP2 and SP6 had explained the condition of the exhibits and the respective markings. They had also made positive identification of the exhibits based upon the photographs (P5(R), P5(T)).

[41] Concerning the second ground, learned counsel submitted that no explanations were given for the discrepancies in weight of the drug exhibits. The recent case of *Zaifull Muhammad v. PP & Another Appeal* [2013] 2 CLJ 383 was cited in support, where it was held by the Federal Court at p. 393 that:

> [35] With respect, we could not agree with the prosecution on this issue. We are of the view that, in the circumstances of this case, it is incumbent on the prosecution to offer some explanation for the discrepancies. With the discrepancies left unexplained, this created a reasonable doubt as to the identity of the drug exhibits. In the circumstances, the defence should not have been called at the close of the prosecution's case.

[42] The facts in *Zaifull Muhammad v. PP & Another Appeal (supra)* are far cry from the present case. In this case, there were material discrepancies in the gross weight of the cannabis mentioned in the original charge compared to the evidence of PW2 and material discrepancy in the number of "ketulan" mentioned in the original charge and number of "ketulan" as testified by PW2, PW4, and PW8. The Federal Court held that there were discrepancies that go to the issue of identity of the drug exhibit. In such circumstances, it was incumbent upon the prosecution to offer some explanation for the discrepancies. This was not done. With the discrepancies left unexplained, it created a reasonable doubt as to the identity of the drug exhibit.

[43] We are mindful that what is at stake here is no less than the mandatory death penalty case. The dangerous drug itself, the cannabis in the present case, constitutes the very *corpus delicti* of the offence and in sustaining conviction for drug trafficking offence under the DDA, the identity and integrity of the *corpus delicti* must be established beyond reasonable doubt. In other words, it must be proven with exactitude that the substance seized or recovered during the operation is the same substance produced in evidence before the court.

[44] In the present case, we entertained no doubt that the exhibit recovered or seized by the police was the same exhibit sent to and examined by the deceased and subsequently produced in court as evidence. We are satisfied that the prosecution had adduced sufficient evidence in respect of every link in the chain of custody, from the moment the exhibit was recovered by the police up to the time it was produced in court. The witnesses had described how and from whom it was received, where it was and what happened to it while in the witnesses' custody, the condition in which it was received and the condition in which it was handed over to the next link in the chain of custody.

Ground (c): The Involvement Of Ahmad Tayyib

[45] The relevant portion of the learned trial judge's judgment reads as follows:

> ... Ahmad Tayyib tidak terlibat langsung dalam perundingan jual beli dadah di antara OKT dan SP4 di Restoran Nasi Kandar Pelita. Berdasarkan keterangan SP4 dan SP5, Ahmad Tayyib hanya muncul bersama OKT semasa OKT datang untuk menyerahkan dadah kepada SP5. Pada ketika itu juga peranan Ahmad Tayyib hanyalah sebagai penumpang di dalam kereta Proton Wira Aeroback nombor pendaftaran PFJ5567. Ahmad Tayyib tidak dilihat memegang beg warna hitam kuning berisi dadah atau menyerah beg tersebut kepada SP5. Apabila OKT pergi semula ke Restoran Nasi Kandar Pelita, Ahmad Tayyib telah masuk ke tempat duduk pemandu dalam kereta Proton Wira Aeroback itu. Hanya setakat itu sahaja penglibatan Ahmad Tayyib di dalam kes ini.

[46] Learned counsel contended that the learned trial judge took an over simplistic approach when Her Ladyship addressed the possibility of Ahmad Tayyib being involved in this case.

[47] Having scrutinised the evidence and the grounds of judgment, we are satisfied that the learned trial judge was right in arriving at that conclusion.

[48] PW2, PW4 and PW5 were cross-examined at length on the basis that Ahmad Tayyib was the actual trafficker who negotiated the sale of the cannabis and delivered the drugs. They had denied the suggestions put forth by the defence counsel, and had given affirmative answers that Ahmad Tayyib was only seen together with the appellant when the appellant returned to deliver the drugs to PW5.

[49] The prosecution witnesses had positively identified the appellant to be the man who was present in the restaurant and conducted the negotiation for sale of the drugs. The bag of drugs was brought to the scene by the appellant after he negotiated with PW4. The appellant was seen clutching the bag and delivered it personally to PW5. He certainly had knowledge that the bag contained drugs as he informed PW5 that there were five slabs of drugs in the bag. He was certainly not a conduit pipe as submitted by learned counsel.

[50] The learned trial judge had properly directed her judicial mind and viewed the whole of the evidence objectively and from all angles. In the circumstances of the case, we are convinced that the presence of Ahmad Tayyib could not cast a reasonable doubt in the prosecution's case.

Ground (d): The Informers

[51] Informer 1 had introduced PW4 to the appellant and was present at the restaurant throughout the negotiations between PW4 and the appellant. Informer 2 who accompanied PW5 was also present at the restaurant, but left before PW5 led the appellant to his car. Learned counsel submitted that both informers had assumed the mantle of agent provocateurs and thus the protection under s. 40 of the DDA had ceased to operate.

[52] This issue has been discussed in cases like *Munusamy Vengadasalam v. PP* [1987] 1 CLJ 250; [1987] CLJ (Rep) 221 (SC), *PP v. Mansor Md Rashid & Anor* [1997] 1 CLJ 233 (FC), *Ghazalee Kassim & Ors v. PP* [2009] 4 CLJ 737 (FC), *Wan Yurillhami Wan Yaacob & Anor v. PP* [2010] 1 CLJ 17 (FC). From these cases, it is clear that whether a person is an informer or has become an active agent provocateur would depend on the facts and circumstances of each particular case.

[53] In the present case, informer 1's role was limited to mere introduction of PW4 to the appellant. Though he was present, there is no iota of evidence that informer 1 had participated in the negotiation. His presence was merely to lend credence to PW4's intention to purchase the drugs in the minds of the appellant. Informer 2's role was even smaller. He had done nothing apart from being present at the restaurant with PW5. We are of the view that they had not metamorphosed into agent provocateurs.

A

Conclusion

[54] We had meticulously and thoroughly examined the appeal record and had paid due attention to learned counsel's arguments. In our considered view, there was overwhelming evidence to
B establish that the appellant was caught *flagrante delicto* selling the dangerous drug to PW4.

[55] In spite of soldierly courage which learned counsel demonstrated while arguing the case for the appellant, he has not succeeded in persuading us that the learned trial judge had
C committed appealable errors, warranting appellate intervention.

[56] For the reasons we have given, we have reached the unhesitating conclusion that the appeal was devoid of any merit. In the result, the appeal is dismissed and the conviction and
D sentenced imposed by the learned trial judge is hereby affirmed.

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